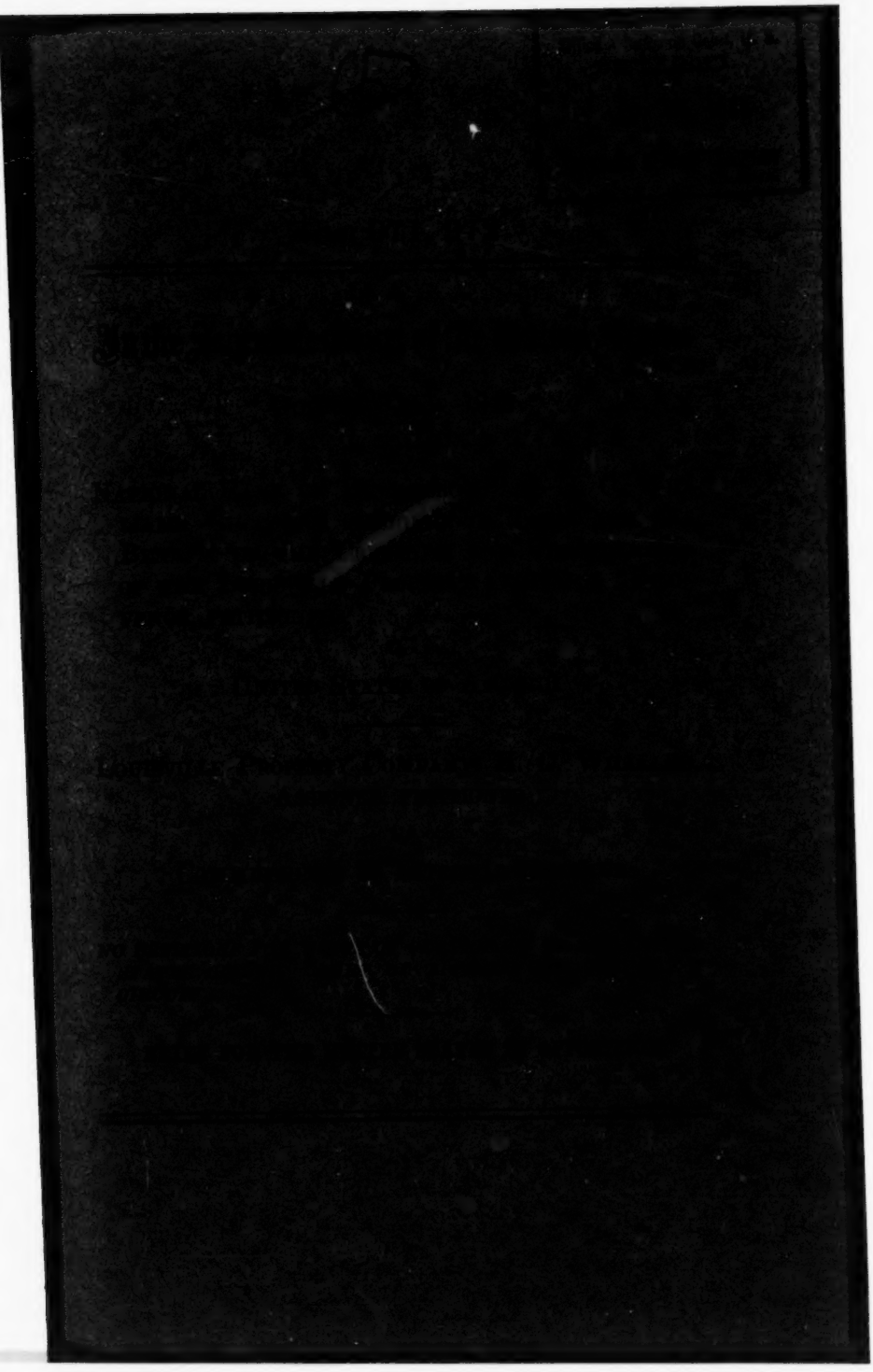

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589435—44——1

In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 971

NATIONAL BANK OF MIDDLESBORO AND H. C. WILLIAMS, SUCCESSOR ASSIGNEE IN TRUST FOR THE BENEFIT OF THE CREDITORS AND STOCKHOLDERS OF THE LOUISVILLE PROPERTY COMPANY, INTERVENOR, PETITIONERS

v.

UNITED STATES OF AMERICA

No. 972

LOUISVILLE PROPERTY COMPANY, H. C. WILLIAMS, ASSIGNEE, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

In No. 971 no opinion was rendered by the district court, but its findings of fact and conclusions

of law may be found at R. 101–104. The opinions of the Board of Tax Appeals in No. 972 are reported at 41 B. T. A. 1249 (R. 47–54) and 47 B. T. A. 23 (R. 78–84). The opinion of the circuit court of appeals covering both cases (No. 971, R. 116–122; No. 972, R. 160–166) is reported at 140 F. (2d) 547.

JURISDICTION

The judgments of the circuit court of appeals were entered on February 7, 1944 (No. 971, R. 115; No. 972, R. 159). The petitions for writs of certiorari were filed May 6, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended.

QUESTIONS PRESENTED

The questions presented in the two cases are the same:

1. Whether the assignee of the Louisville Property Company was "operating the business or property" of that company within the meaning of Section 52 of the Revenue Acts of 1934 and 1936 and so is liable for income tax on net income from such operations at the corporate rate.

2. Whether the dismissal by the Board of Tax Appeals of a prior proceeding involving petitioner's 1937 taxes was *res judicata* against the Government in these cases.

STATUTE AND REGULATIONS INVOLVED

The statute and regulations involved are set forth in the Appendix, *infra,* pp. 15–16.

STATEMENT

These cases involve the liability for corporate income taxes, under Section 52 of the Revenue Acts of 1934 and 1936, of H. C. Williams, as assignee of the Louisville Property Company. In No. 972 petitioner is seeking to set aside a decision of the Tax Court, affirmed by the Circuit Court of Appeals, covering the tax years 1935 and 1936. In No. 971 petitioner is seeking to reverse the judgment of the United States District Court, affirmed by the Circuit Court of Appeals, allowing the United States to levy on bank deposits of Williams, assignee, for taxes for the year 1937. In each case the petitioner argues, on the merits, that Williams is not liable for corporation taxes, and also that a prior dismissal by the Board of Tax Appeals of his petition to review the 1937 assessment for lack of jurisdiction is *res judicata* in his favor.

The facts.—In order that the case may best be understood, the facts as found by the Board of Tax Appeals in No. 972 will be stated first.

The Louisville Property Company is a corporation organized in 1898 under the laws of Ken-

tucky and authorized by its charter to deal in all kinds of property (No. 972, R. 71).

Prior to 1919 one of the minority stockholders of the Louisville Property Company instituted a suit to annul a conveyance of corporate property made by the corporation and to wind up its affairs. The suit reached the Court of Appeals of Kentucky, and on May 23, 1919, the court held that the company had not been managed for the benefit of all the stockholders; that its property should be sold and its affairs should be wound up; and that to this end a receiver should be appointed to be under control of the court. (No. 972, R. 71–72.)

After this decision was rendered the stockholders, directors, and creditors realized that receivership might prove too expensive, so they agreed upon a plan, in lieu of receivership, whereby the corporation by deed of assignment executed November 6, 1919, conveyed all its assets in fee simple to the United States Trust Company in trust for the payment of the debts of the corporation and the expenses of administration, and the distribution of the remainder, if any, of the proceeds of the sale of the assignor's property to its stockholders ratably according to their holdings at the time such distribution was to be made. The corporation then published notice to the public that it was closing up its business and winding up its affairs. There-

after the Louisville Property Company, apart from its assignee or its successor assignee, had no assets, did not buy or sell any property, and carried on no business, but continued its corporate existence for the sole purpose of keeping a register of its stockholders for the transfers of shares so that the assignee or successor assignee might know the names of the stockholders to whom final distribution should be made. (No. 972, R. 72–74.)

After receiving the assets of the Louisville Property Company, the trustee proceeded to sell and dispose of them as fast as it could advantageously and to disburse the proceeds as provided in the deed of November 6, 1919 (No. 972, R. 74).

On May 11, 1935, after petition of the trustee, the Whitley Circuit Court of Kentucky appointed H. C. Williams, of Middlesboro, Kentucky, as successor assignee of the Louisville Property Company, under the deed of assignment, and directed that the action be continued on the docket under the style of "H. C. Williams, Assignee of the Louisville Property Company, plaintiff, versus Louisville Property Company, et al. etc." The court instructed Williams to continue to dispose of the assets, which were turned over to him, in an orderly manner and to report from time to time to the court the receipts and disbursements, and Williams has done this annually since that time, at the close of each year. (No. 972, R. 74.)

The property conveyed to Williams consisted of land and cash. Williams proceeded to liquidate

and dispose of the property as and when he could, advantageously and without sacrificing the property. At the time Williams was appointed successor assignee, there were only a few remaining creditors of Louisville Property Company and their claims were in dispute and in litigation. Williams has withheld any payment on them until the amounts due are finally determined. (No. 972, R. 75.)

Some of the lands transferred to Williams contained mineable coal. The coal rights have been leased to operators, who pay Williams royalties on the coal mined. Williams has never had any mining equipment and has never at any time carried on any mining operations on these lands. Other lands transferred to Williams had merchantable timber on them. Williams has never cut or manufactured any of the timber but did sell the standing timber whenever he could do so to an advantage. (No. 972, R. 75.)

In connection with his duties as "Assignee of the Louisville Property Company" Williams has maintained an office at Middlesboro, Kentucky, where he employs a secretary-bookkeeper. He also employs an engineer and a field man, who are required to look after and protect the properties and to inspect the coal mines from time to time. He rents any vacant buildings at the mines at a low rate in order to prevent their being destroyed or removed. (No. 972, R. 75–76.)

Williams has had no business connections or dealings with the Louisville Property Company since May 11, 1935, except as successor assignee of its properties; he has made no reports to it; and it has made no demands upon him with respect to his operations and has never exercised any authority over the properties (No. 972, R. 76).

Proceedings in No. 972—Tax years 1935 and 1936.—Williams filed fiduciary returns of income on Form 1041 for the years 1935 and 1936 in the name of Louisville Property Company, as the estate or trust, and the name of the fiduciary as "H. C. Williams, Assignee, Middlesboro, Kentucky." The returns disclosed net incomes of $1,577.53 and $9,140.80, respectively. Williams also filed individual income tax returns on Form 1040 for these years in the name of "H. C. Williams, Assignee, Louisville Property Company, Middlesboro, Kentucky", which return disclosed net income as stated and total tax liability of $23.14 and $614.11, respectively. These taxes were paid to the Collector for the District of Kentucky. The Commissioner determined that taxes should have been paid at the rate for corporations, and the taxpayer brought the case to the Board of Tax Appeals.

The Board found that during the years 1935 and 1936 H. C. Williams, successor assignee to

the United States Trust Company, was operating the property or business of the Louisville Property Company, a corporation in dissolution, as a successor assignee in trust for the benefit of the creditors and stockholders of the corporation, and, as such assignee, Williams should have made returns for the corporation in the same manner and form as corporations are required to make returns. (No. 972, R. 77.) Accordingly, it held on the principal issue here that the tax should be paid for those years at the corporate rate (No. 972, R. 84).

Proceedings in No. 971—Tax Year 1937.—A similar deficiency assessment for 1937 was made against the taxpayer, the notice being sent to "Louisville Property Company, H. C. Williams, Assignee" (No. 971, R. 16). In response to the notice, a petition challenging the deficiency was filed in the Board of Tax Appeals under the caption (*ibid.*):

> H. C. Williams, Successor Assignee In Trust For The Benefit Of The Creditors And Stockholders Of Louisville Property Company, Petitioner, v. Commissioner Of Internal Revenue, Respondent.

The Commissioner moved to dismiss, on the ground that the petition did not contain the proper caption (No. 971, R. 27–28). On December 29, 1939, the Board dismissed the proceedings for lack of jurisdiction on the ground that (*id.* at p. 29)—

> * * * the deficiency was determined against a corporation and the notice sent to the corporation in the care of an assignee, whereas the petition is filed by a wholly different person who does not claim to have any authority to act for the corporation.

No appeal was taken from this order.

On May 23, 1941, a notice of levy was served upon the National Bank of Middlesboro, Kentucky, notifying it that all bank deposits in its possession belonging to Louisville Property Company, H. C. Williams, Assignee, were seized and levied upon for the payment of the above tax and interest. At that time there were funds on deposit in this bank in the name of H. C. Williams, Assignee, Louisville Property Company. As the bank refused to surrender such funds, the Commissioner requested the Attorney General to institute this action against the bank to enforce the surrender of funds levied on. (No. 971, R. 102.)

The bank deposits which were levied on are proceeds realized from rents, royalties, and the sale of assets conveyed by Louisville Property Company, to the first assignee, the United States Trust Company, by deed of assignment dated November 6, 1919, and later transferred to H. C. Williams as Successor Assignee, pursuant to order of the Whitley Circuit Court entered in May 1935 (No. 971, R. 103).

Decisions below.—Both the District Court (No. 971, R. 104) and the Board of Tax Appeals (No.

972, R. 58–60) concluded that the dismissal of the petition for 1937 taxes by the Board was not *res judicata* as to the merits of the controversy, the Board stating explicitly that the questions before it in the two proceedings were not the same (*ibid.*). Both court (No. 971, R. 103) and Board (No. 972, R. 77–81) also found that Williams, as assignee, was conducting or operating the business of the Louisville Property Company, and that accordingly the taxes should have been paid on behalf of the corporation. As a consequence, Williams, as assignee, was liable for the claimed deficiency for 1935 and 1936, and the United States had the right to levy on his bank account as assignee for 1937 taxes. These rulings were affirmed by the Circuit Court of Appeals in a single opinion (No. 971, R. 115–122; No. 972, R. 159–166).

ARGUMENT

1. Section 52 of the Revenue Acts of 1934 and 1936, after stating that corporations shall file income tax returns, provides:

> In cases where receivers, trustees in bankruptcy, or assignees are operating the property or business of corporations, such receivers, trustees, or assignees shall make returns for such corporations in the same manner and form as corporations are required to make returns. Any tax due on the basis of such returns made by receivers, trustees, or assignees shall be collected in the same manner as if collected from the

corporations of whose business or property they have custody and control.

Williams here admittedly was an assignee, and the only question is whether he was "operating the property or business" of the corporation. On that issue of fact, the two lower courts in No. 971 and the Board and the Circuit Court of Appeals in No. 972 have all found that he was.

Petitioner argues that this is incorrect because the assets were assigned for purposes of liquidation. But the orderly liquidation of property, which includes, as here, the management for profit of assets which it is not advantageous to sell, may constitute the carrying on of business. Cf. *Magruder* v. *Washington B. & A. Realty Corp.*, 316 U. S. 69. The Treasury Regulations under Section 52 expressly so provide,[1] and the decision below to that effect is supported by *United States* v. *Metcalf*, 131 F. 2d 677 (C. C. A. 9), certiorari denied, 318 U. S. 769, and *State* v. *American Bonding & Cas. Co.*, 225 Iowa 638.

Petitioner asserts a conflict between these cases and *Commissioner* v. *Merchants National Building Corp.*, 131 F. 2d 740 (C. C. A. 5). The opinion of the court in that case stated merely that "cases of this nature must be decided upon their particular facts" and that it was confronted with findings of the Board of Tax Appeals which there was no basis for setting aside. The opinion

[1] See Treasury Regulations 94, Article 52–2, printed in the Appendix, *infra*, pp. 15–16.

of the Board, to which we are thus referred, states expressly that under the regulations and controlling decisions, the assignee would have been held taxable as a corporation if the transfer of assets had been "directly connected with a plan of dissolution." 45 B. T. A. 417, 425. The factor lacking in the peculiar circumstances of that case is present here. The Board in the instant case held not only that the *Merchants* case was distinguishable but that it supported a decision against the petitioner (No. 972, R. 80).

2. Petitioners contend that the dismissal by the Board of Tax Appeals of Williams' petition for a review with respect to the 1937 deficiency is *res judicata* in their favor in both actions and urge that an important issue is presented as to whether that doctrine applies to the Tax Court. The court below found it unnecessary to decide that general question; assuming that the doctrine applied, it held, as had the Board of Tax Appeals, that the issues ruled upon in the two cases were not identical (No. 971, R. 121; No. 972, R. 165). This decision was clearly correct.

The dismissal by the Board for want of jurisdiction of the petition relating to the 1937 deficiency was based upon the fact that the party to the deficiency notice was the corporation, in the care of its assignee, whereas the petition for review was filed by the assignee in trust for the benefit of creditors and stockholders, not for the corporation

(No. 971, R. 28–29). The petition in No. 972, relating to 1935 and 1936 taxes, was originally captioned "H. C. Williams, Trustee Louisville Property Company" (No. 972, R. 6), and the first amended petition was entitled "Louisville Property Company, H. C. Williams, Assignee" (No. 972, R. 30), a caption which was approved by the Board (No. 972, R. 34–35). Petitioner's subsequent motion (No. 972, R. 37) to change the caption to that which had by that time been held inadequate in the 1937 proceeding [2] was denied by the Board (No. 972, R. 47–55, 58–60). Thus in the 1935–36 case the petitioner before the Board was the party described in the deficiency notice, and the basis for the dismissal of the 1937 petition was lacking. A decision holding one caption improper is obviously not *res judicata* in a case bearing another caption.

It is also clear that the Board's holding that it had no jurisdiction of the 1937 case for the reasons mentioned did not foreclose the jurisdiction of the District Court in the suit brought by the United States. The petition (No. 971, pp.

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[2] The amended petition as to 1935–1936 taxes was filed February 15, 1939 (No. 972, R. 30), and the caption approved by the Board March 3, 1939 (No. 972, R. 34–35). The petition as to 1937 taxes, bearing a different caption, was filed October 27, 1939 (R. 972, R. 85), and dismissed for want of jurisdiction because of the caption December 20, 1939 (No. 972, R. 107–108). The motion to change the caption in the first proceeding to that held improper in the second was filed February 19, 1940 (No. 972, R. 37).

10–12) seems to treat the Board's order of dismissal as a decision on the merits of the controversy binding on the District Court. But the order was not a determination that Williams was not an assignee "operating the property or business" of the corporation within the meaning of Section 52, which is the issue presented on the merits. The decision on the motion was based on the form of the pleadings, which were all the Board had before it at that time, not upon the nature of the relationship between Williams and the company. The question as to whether the prior proceeding involved the identical issue has now been decided adversely to petitioner by three tribunals and is obviously not of general importance.

CONCLUSION

The decisions below are correct, and there is no conflict. The petitions for certiorari should be denied.

Respectfully submitted.

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MAY 1944.